FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 11 1907
JAMES H. McKENNEY,
CLERK.

No. 155. OCTOBER TERM, 1906.

IN THE

Supreme Court of the United States

William J. Doyle and James G. Doak, trading as Doyle & Doak,

vs.

London Guarantee & Accident Company, Limited.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

E. CLINTON RHOADS,
For Plaintiff in Error.

JOHN C. BELL,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906. No. 155.

William J. Doyle and James G. Doak, trading as Doyle & Doak.

vs.

London Guarantee & Accident Company, Limited.

BRIEF FOR PLAINTIFF IN ERROR.

FACTS.

This case comes before the United States Supreme Court upon a question certified by the United Circuit Court of Appeals for the Third Circuit.

The facts out of which this question arose are stated in the certificate from the lower court, but we take the liberty of making an additional statement, believing that whether this court may or may not take cognizance of additional facts, it is perfectly proper that any state of facts may be considered as an hypothesis by which the soundness of conclusions of law may be tested.

The London Guarantee and Accident Company issued a writ in *assumpsit*, and before filing any declaration they filed a petition asking for the inspection of books and papers, for the purpose of framing a declaration. This was resisted on the ground that the court had no jurisdiction to make the order asked for.

The defendants claimed that the only authority in a common law action, for the production of books and papers, was under Revised Statute 724, which provided

for the production of papers only after issue joined, and which further provided as its only penalty a judgment by default. The Circuit Court made the order. The defendants failed to produce books, and alleged their inability to produce them. The Circuit Court found that their failure to produce books and papers was not satisfactorily explained, finding among other things that the burden of proof was upon the defendants; and thereupon the defendants were found guilty of disobeying the other in question, and were adjudged guilty of contempt, and the order was made which was certified by the Court of Appeals.

THE QUESTION CERTIFIED IS—

> "Has the Circuit Court of Appeals jurisdiction upon the writ of error sued out by the defendants to review the above recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of court in disobeying the above recited order of court of June 25th, 1904, and imposing upon the defendants a fine of $250 on the specified condition and terms?"

ARGUMENT.

The question of law then is: Has the Circuit Court of Appeals jurisdiction to relieve from the imposition of a penalty for contempt for disobedience of an order which the Circuit Court had no authority to make?

The contention of the appellee is that the order in this case involves a "civil contempt," from which there is no appeal.

The authority of the United States Circuit Court of Appeals arises under the Act of 1891, and is as follows:—

> "SECTION 6. That the Circuit Court of Appeals established by this Act, shall exercise appellate jurisdiction to review by appeal or by writ of error; final de-

cision in the * * * existing circuit courts in all cases other than those provided for in the preceding Section of this act."

What is a "final decision" has been a matter of controversy, but the authorities justify the statement that when an order has been made which must be carried immediately into execution it is final, and it is not the less final because incident to some other litigation. It is not impossible to have two final decisions within the limits of one general matter of litigation.

The list of cases bearing on contempt includes a multitude, and undoubtedly there exists a conflict of authority. We shall consequently confine ourselves chiefly to the discussion of federal cases.

There is no magic about a contempt case which forbids the Appellate Courts to rectify a wrong. The difficulty has been to find the machinery. Long before the creation of the Circuit Courts of Appeal, the United States Supreme Court took what was practically an appellate jurisdiction through the medium of writs of *habeas corpus* and *certiorari*. This court thus relieved against orders which were void.

When the United States Circuit Courts of Appeal were established, their appellate jurisdiction included criminal cases. If then a proceeding in contempt is a criminal proceeding, that court has jurisdiction.

That proposition is not seriously denied, but it is contended that there are two kinds of contempt, criminal and civil. While this may be a convenient colloquial classification, it is not sound in view of the authorities, and the correct statement is that what are called civil contempts are not contempts at all, but mere remedies equivalent to an execution, the typical cases being an order for the payment of money equivalent to damages, and an order for the payment of alimony, or in a probate court, for payment of an award. When this is conceded no prac-

tical injustice is done, for such an order is usually a final order, or if it is not executed, can be controlled so as to await the conclusion of the suit.

Should we be in error in thus insisting that all contempts are criminal in their characteristics, we still insist that the *contumacy of a witness is* within the classification of criminal contempts, as pertaining primarily to the authority of the court as distinguished from the assertion of a private right.

Mr. Justice Black, of Pennsylvania very emphatically illustrates this in the celebrated Williamson case. He states in substance that if a witness swear falsely in a private cause, he would of course be guilty of perjury, and the criminal accusation would be a totally separate procedure. Why should it not also be, he asks, if instead of swearing falsely, the witness had refused to swear at all, and had thereupon became the subject of a proceeding in contempt.

Should the contention of the appellee prevail, the result would be that the court could make an order which it had no legal authority to make, and proceed as in this case, to an execution, with the result that the order could not be challenged because the contempt was not criminal, and as a civil contempt could not be challenged because, as it contends, the order was not final; and the only opportunity to appeal at all, would be at the end of the primary litigation, which would be long after the sentence contemplated by the order in the contempt proceedings had been executed.

From such a practical absurdity there must be some escape. The escape is, as we have said, first, that the contempt case is a criminal proceeding, and the order imposing a penalty is a final order in that proceeding; and secondly, that under the double classification, when an order in contempt is made imposing a penalty, it becomes a final order which is appealable.

We submit that a study of the recent cases of this court justifies our conclusions.

In the Hanks case, 194 U. S., 303, this court found that the testimony taken in the lower court, supposably under

Section 870 of the New York Code, was taken without the authority of law, and the decision in that case based upon the evidence thus taken was reversed. If, instead of the witness having permitted his testimony to be taken, he had refused to answer, it is possible that we are forced to the conclusion that the witness must be committed and remain in jail until this court shall have decided at the end of the main litigation that the inquiry was without jurisdiction.

In Bessette *vs.* Conkey, 194 U. S., 324, an appeal from the contempt proceeding was entertained, the contempt being the disobedience of a temporary restraining order, and we believe that case sustains the proposition that contempts are essentially criminal in their character. In this case the peculiarity was that the appellant was a witness only.

In the Christensen case, 194 U. S., 458, an appeal was entertained from a contempt, which arose from the disobedience of a preliminary injunction. In this case the appellant was a party. This case again sustains the proposition that a contempt is substantially a criminal proceeding, and that what are known as civil contempts are properly exceptions, and are substantially executions in the form of an attachment.

In the Alexander case, 201 U. S., 117, we find the principle announced that in a contempt proceeding of the class which might be called a civil contempt, when the transaction has passed to the stage of disobedience and penalty, the case becomes a final decision.

We respectfully submit that in cases in which a distinction is made between a witness and a party, that it is not meant that a party who becomes a witness is denied rights which a witness would have. To assert that when a defendant has a clerk who refuses to produce a paper there may be an appeal from the finding of disobedience, and if the defendant himself be called as a witness to produce the same paper under the same circumstances, he may be committed for contempt without any appeal, would, we submit, present an absurd situation, which the law would

not countenance. It might be perfectly correct to say that an order committing a witness for contempt would have no bearing upon the main litigation, and that as to the main litigation it might be an interlocutory order; but it by no means follows that when the plaintiff calls the defendant as a witness, the defendant is denied the right to appeal from a penalty following an unauthorized order.

This view is sustained in Lester *vs.* People, 150 Illinois, 408, where the person subject to the contempt proceeding was a party to the primary litigation.

We now proceed to a more detailed consideration of cases bearing upon the question of "final decree."

In Thompson *vs.* Dean, 74 U. S., 342, Chief Justice Chase discusses the question of final decree, and rules in that case that an order to transfer stock was final, and justified an appeal, notwithstanding there remained accounts to be settled. The opinion of the court in this case lays down the general test for finality of the decision, and subsequent cases have done little more than apply it.

Mr. Chief Justice Chase says, *inter alia*, the following:

> "In this case the decree directs the performance of a specific act, and requires it to be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification or change was possible after the term, except on rehearing or by bill of review in the Circuit Court or other appeal in this court * * * But it is insisted that this court has held that no decree which does not completely dispose of the whole cause is final, and that this decree though disposing completely of the controversy as to the ownership of the stock, is not final, because it directs certain accounts to be taken.

"It is true that this court has always desired that appeals be taken only from decrees which are not only final but complete; and has, upon one occasion, at least, directed the attention of the Circuit Court to the expediency and importance of refraining from making final decrees on any part of a cause, however important, until prepared to dispose of it completely. Such a course would undoubtedly save much inconvenience, both to the Circuit Court and this court, and diminish largely the expense of litigation to suitors.

"And it may be true, that under the influence of these considerations the degree of finality essential to the right of appeal has been sometimes pushed quite to the limit of construction. But we think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of Forgay *vs.* Conrad, and which we again declare in his own language: 'When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed.'

"The reasoning in the case just cited fully vindicates this rule, in our judgment, as a sound construction of the Acts of Congress relating to appeals, and is sustained by the authority of several decisions."

In Alexander *vs.* U. S., 201 U. S., 117, the principle for which we contend is ruled under circumstances which bring it very close to the case at bar. This was an appeal from an order to produce books and papers. The syllabus of the case states:—

"While such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court.

"If the witness refuses to obey and the court goes further and *punishes him for contempt there is a right of review*, and this is adequate for his protection without unduly impeding the process of the case."

The Supreme Court adopted the dictum of the United States Court for the District of Minnesota, as follows:—

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the *witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand.* I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

In the case of Bessette *vs.* Conkey, 194 U. S., 329, in discussing the question of contempt as incident to some remedial action, the court says:—

"The punishment is to secure to the adverse party the right which the court has awarded to him. He is

> the one primarily interested, and if it will turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in *setting aside the punishment* which was imposed for disobeying an order to which the adverse party was not entitled."

This dictum, read in connection with the foregoing authorities, would appear to establish the proposition that when the lower court undertook to compel obedience to an order secured by the complainant, and to which he was not entitled, the order became final, and justified a writ of error.

City of Eau Claire *vs.* Payson, 107 Fed. Rep., 552.

By the Court of Appeals for the Seventh Circuit, it was held that an order providing for the payment of money with no provision for return, was a final order, and as such appealable. The court said:—

> "The Supreme Court has not placed upon the words 'final decree' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction."

Bullock Electrical & Mfg. Co. *vs.* Westinghouse Co., 129 Fed. Rep., 105, was the case of the violation of an injunction; the court held:—

> "The willful violation of an injunction by a party to the cause is a contempt of court, which constitutes a criminal misdemeanor, and the proceeding to punish therefor is in its nature a criminal proceeding, entirely independent and distinct from the suit in which the injunction decree was entered, and a judgment of conviction therein is reviewable by writ of error, and not by appeal.
>
> "A judgment of a Circuit Court imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and if un-

conditioned and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error."

Judge Lurton says:—

"To say that he may pay his fine or endure his imprisonment and review the legality of the matter at some indefinite time in the future, is to deny in effect the right of review at all."

In re Lester, 150 Ills., 408.

In this case the view for which we contend was sustained. An order to produce books was made, and upon an appeal to the Supreme Court the appeal was dismissed. After that the lower court found the defendant guilty of contempt, and made an additional order imposing a penalty. This order was held appealable, notwithstanding it was incident to other litigation.

The authorities prove that all cases of contempt are primarily criminal in their nature, and are separable from any litigation to which they are incident.

We submit that there is considerable confusion in the cases, due to the use of the term "civil contempt," and we contend that all cases of disobedience to the orders of a court, which are properly contempts, are criminal cases, and that the term "civil contempt" is properly applicable to cases which are in substance executions, such as attachments for the payment of money, fines which are merely compensatory in their nature, orders for the payment of alimony, and orders for the payment of sums found to be due in probate courts and in similar cases.

New Orleans *vs.* Steamship Co., 87 U. S., 392.

In this case a fine was imposed for the destruction by the officials of the city of New Orleans of certain Steamship Company property. This appears to have been in

violation of an injunction. It was held that the imposition of the fine was not appealable, for the reason that the case was a criminal case. Mr. Justice Swayne said:—

> "The fine of $300 imposed upon the Mayor is beyond our jurisdiction. *Contempt of court is a specific criminal offense.* The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division of opinion."

This same proposition is stated in the celebrated case of Passamore, 8 Williamson, 26 Pa., page 9.

In this case the Supreme Court of Pennsylvania refused to entertain appellate jurisdiction, for the reasons stated in the New Orleans case. Mr. Justice Black also suggests an illustration which, if it may be adopted, would rule the case at bar.

> "It must be remembered that contempt of court is a specific criminal offence. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction, and the commitment in consequence is execution. This is well settled, and I believe has never been doubted. Certainly the learned counsel for the petitioner have not denied it. The contempt may be connected with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. The record of a conviction for contempt is as distinct from the matter under investigation when it was committed, as an indictment for perjury is from the cause

in which the false oath was taken. * * * If instead of swearing falsely he *refuses to be sworn at all,* and is convicted not of perjury *but of contempt, the same rule applies,* and with a force precisely equal."

Bullock *vs.* West, 129 Fed. Rep., 104.

The opinion of Judge Lurton in this case fully sustains appellant's position.

The case of Bessette *vs.* Conkey, 149, U. S., 329, read in connection with that of the Christensen Engineering Company, 194 U. S., 458, justifies the proposition that contempts are primarily criminal in their nautre.

In the Conkey case it was held that the conduct in that case which was the violation of an injunction, was to be regarded as punitive "like misconduct in the court room or *disobedience to a subpoena,* and as among those acts primarily directed against the power of the court."

In the Christensen case, the court referred "to the distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court."

In both of these case the term civil contempt is applied to cases where the fine was in the nature of a compensation.

The Appellate Court has authority to relieve from a void order.

There seems to be a distinction between the circumstances under which an Appellate Court will take cognizance of an appeal, when on the one hand it is a question of the proper exercise of jurisdiction, and on the other hand, a question of *want of jurisdiction.*

In re Chetwood, 165 U. S., 443: In this case a writ of *certiorari* was allowed in a contempt case, notwithstanding the court had not appellate jurisdiction. The court said, page 461:—

> "As in our opinion the Circuit Court exceeded its jurisdiction in thus proceeding, we are constrained to make the rule absolute. * * * Judgments in proceedings in contempt are not reviewable here on appeal or error, but they may be reached by *certiorari* in the absence of any other adequate remedy. The writ of *certiorari* will be allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them to refrain from prosecuting the one writ in the name of the bank and to dismiss the other, may be revised and annulled.
>
> Commonwealth *vs.* Perkins, 124 Pa., 36.

This was a *habeas corpus* proceeding to relieve from a contempt of court in which before issue joined the defendant refused to comply with an order for the inspection of his machine, the "Keely Motor," the order was reversed by the Pennsylvania Supreme Court.

Mr. Justice Paxson says:—

> "If the court below had jurisdiction of the parties and the subject matter, and the order in question was lawfully made, it possessed the power to enforce it by attachment. *It is almost needless to say that the converse of this proposition is equally true.*"

That a writ of error is the proper method of review is ruled by

Bullock *vs.* West, 129 Fed. Rep., 105;
Bessette *vs.* Conkey, 194 U. S., 324.

We therefore submit that the foregoing argument shows that:—

1. Contempts of court are in substance criminal cases, and as such the imposition of a penalty is a final decision of which the Court of Appeals has jurisdiction.

2. The term "civil contempt" is a misnomer; the correct statement being that a money execution which is enforced through the medium of an attachment, is primarily an execution.

3. Even in cases which have been called civil contempts, when the litigation reaches the point of an order, followed by a refusal to obey, which in turn is followed by the imposition of a penalty, the decision is final, and whether considered as a criminal case or not, the order imposing the penalty is appealable.

4. The authorities recognize the right of appeal from a *void* order, even where the right to appeal is otherwise in doubt.

5. The law will avoid the absurdity of any rule, the effect of which is to entertain an appeal from a void order, after a sentence thereon has been executed.

E. CLINTON RHOADS,
for Plaintiff in Error.

JOHN C. BELL,
of Counsel.